Supreme Court, U.S.
FILED
DEC 8 1998

No. 97-2000

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,
v.
DELORES SCOTT SULLIVAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PENNSYLVANIA FEDERATION OF INJURED WORKERS AS AMICUS CURIAE SUPPORTING RESPONDENTS

RODERICK M. HILLS, JR.
Assistant Professor of Law
THE UNIVERSITY OF MICHIGAN LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-9635

RICHARD W. MCHUGH
Counsel of Record
MICHIGAN POVERTY LAW PROGRAM-WEST
611 Church Street, Suite 4D
Ann Arbor, Michigan 48104-3000
(734) 332-1015
Counsel for Amicus Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether insurance companies were "state actors" when, acting in conjunction with a state agency, they used statutory provisions authorizing them to stop payments for workers' compensation medical benefits that were, by law, disabled workers' exclusive source of medical benefits?

2. Whether due process requires that disabled workers get prior notice and an opportunity to be heard before their workers' compensation medical benefits can be indefinitely suspended for months or years until utilization review and administrative hearings can be completed?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. INSURANCE COMPANIES WERE "STATE ACTORS" WHEN THEY USED STATUTORY PROVISIONS GIVING THEM AUTHORITY TO STOP, WITHOUT PRIOR NOTICE OR AN OPPORTUNITY TO BE HEARD, WORKERS' COMPENSATION PAYMENTS THAT WERE DISABLED WORKERS' EXCLUSIVE SOURCE OF MEDICAL BENEFITS	4
II. DUE PROCESS REQUIREMENTS OF NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO INDEFINITE SUSPENSION OF WORKERS' COMPENSATION MEDICAL BENEFITS DO NOT CONFLICT WITH LEGITIMATE UTILIZATION REVIEW	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases — Page

Allen v. Workers' Compensation Comm'r, 173 W.Va. 238, 314 S.E.2d 401 (1984) 16
Auxier v. Woodward State Hospital-School, 266 N.W.2d 139 (Iowa, 1978) 16
Baksalary v. Smith, 579 F. Supp. 218 (E.D. Pa. 1984) 6
Baksalary v. Smith, 591 F. Supp. 1279 (E.D. Pa. 1984) 6
Barnes v. Lehman, 861 F.2d 1383 (5th Cir. 1988) .. 9
Beckler v. North Dakota Workers Compensation Bureau, 418 N.W. 2d 770 (N.D. 1988) 16
Blum v. Yaretsky, 457 U.S. 991 (1982) ..... *passim*
Carr v. SAIF Corp., 65 Or. App. 110, 670 P.2d 1037 (1983) 16
Dillard v. Industrial Commission of Virginia, 416 U.S. 783 (1974) 14
Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) 4, 7, 8, 14
Frohlich v. North Dakota Workers Compensation Bureau, 556 N.W.2d 297 (N.D. 1996) 16
Higgins v. Wyoming Worker's Compensation Div., 739 P.2d 129 (Wyo. 1987) 17
Lavey v. Thomas Olean & Sons, 502 A.2d 344 (R.I. 1985) 17
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 5
Lugar v. Edmondson Oil Co., 457 U.S. 922 (1981) .. 13
Marsh v. Alabama, 326 U.S. 501 (1946) 8
Mathews v. Eldridge, 424 U.S. 319 (1976) 16, 17
Mitchell v. State Workmen's Compensation Comm'r, 163 W.Va. 107, 256 S.E.2d 1 (1979) 16
New York Central RR v. White, 243 U.S. 188 (1917) 8
Nixon v. Condon, 286 U.S. 73 (1932) 8
P.M. v. Metromedia Steakhouses, 931 S.W.2d 846 (Mo. App. 1996) 17
Polk County v. Dodson, 454 U.S. 312 (1981) 11, 12
Smith v. Allwright, 321 U.S. 649 (1944) 8
Terry v. Adams, 345 U.S. 461 (1953) 8

TABLE OF AUTHORITIES—Continued

Page

Tower v. Glover, 467 U.S. 914 (1984) 12
Tulsa Profession Collection Services v. Pope, 485 U.S. 478 (1988) 4, 13
United States v. Classic, 313 U.S. 299 (1941) 2, 5
Valliere v. Workers' Compensation Board, 669 A.2d 1328 (Me. 1996) 16
Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925 (1984) 8
West v. Atkins, 487 U.S. 42 (1988) 2, 4, 5, 14

Other Authorities

42 U.S.C. § 1983 2
Pennsylvania Constitution, Article III, § 18 5
Pennsylvania Workers' Compensation Act, 77 Pa. Stat. Ann. § 1 *et seq.* ..... *passim*
§ 481(a) 5, 8
§ 531(5) ..... *passim*
§ 531(6) ..... *passim*
§ 1053 5
34 Pa. Code § 127.208(e) 10, 13
S. Eccleston and C. Yeager, Workers' Compensation Research Institute, *Managed Care and Medical Cost Containment in Workers' Compensation, A National Inventory, 1997-1998* 15, 18
R. Larson, *Law of Workers' Compensation* (1991) 15
O. Kramer and R. Briffault, *Workers Compensation: Strengthening the Social Compact* (1991, Insurance Information Institute Press) 8
Report of the National Commission on State Workmen's Compensation Laws (1972) 17
Texas Jur. 3d, "Work Injury Compensation" (1991) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 97-2000

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, *et al.*,
Petitioners,

v.

DELORES SCOTT SULLIVAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PENNSYLVANIA FEDERATION OF INJURED WORKERS AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The Pennsylvania Federation of Injured Workers is a statewide organization of injured workers and their families with approximately two thousand members organized into ten local chapters.[1] The overwhelming number of

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* Federation state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amicus* and its counsel contributed to the preparation of this brief. Because the *Amicus* Federation is unable to afford the cost of printed briefs, the Pennsylvania AFL-CIO has agreed to pay the costs of printing and service of the brief. Written general consents by the parties to the filing of this brief have been lodged with the Clerk.

injured worker members of the Federation are recipients of, or applicants for, workers' compensation benefits under the Pennsylvania Workers' Compensation Act. The Federation was organized in 1995 in order to advocate for the medical, social and legal needs of injured workers in Pennsylvania and to assist injured workers in obtaining compensation for their workplace injuries.

Pennsylvania's challenged supersedeas provision, which permitted insurance companies to terminate workers' compensation medical benefits without prior notice or an opportunity to be heard for the injured worker, left many of these workers without meaningful alternatives for obtaining care for their injuries in the months or years of administrative proceedings required to obtain reinstatement. Because this Court's decision will have an important impact on the rights of its members and other injured workers in Pennsylvania, the Federation offers its views in this brief in support of the Respondents.

SUMMARY OF ARGUMENT

The Fourteenth Amendment prohibits a "State" from "depriv[ing] any person of life, liberty, or property without due process of law." Section 1983, in turn, provides a remedy against "[e]very person" for any such "deprivations" occurring "under color of any statute, ordinance, regulation, custom, or usage, of any State. . . ." Rev. Stat. § 1979, 42 U.S.C. § 1983.

This Court has repeatedly held that where private defendants infringe federal rights and the actions are "fairly attributable to the State," these private parties are "state actors" for purposes of the Fourteenth Amendment. *West v. Atkins*, 487 U.S. 42, 54 (1988) (Blackman, J.). In addition, where these defendants "have exercised power 'possessed only because the wrongdoer is clothed with the authority of state law,' " they have acted "under color of state law" for purposes of Section 1983. *Id.* 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941).

Pennsylvania adopted the 1993 legislation challenged in this appeal to cut the costs of medical care under its workers' compensation law. The major mechanism selected was permitting employers and their insurance companies to pick injured workers for what was termed "utilization review." After their selection for utilization review by their employer or its insurer (and the Commonwealth's initial approval of the application for utilization review), these workers had their medical benefit payments suspended by supersedeas *at the behest of insurers and prior to any third parties' indication of any legitimate concern regarding their medical treatment.*

As a result, admittedly disabled workers—*whose sole legal remedy for obtaining medical care for their work-related injuries was workers' compensation benefits*—lost their medical benefits for periods of months or years. And, as the final straw, the state authorized the insurer's to invoke supersedeas without prior notice to the injured worker or an opportunity by the injured worker to be heard on the proposed suspension of his or her medical benefits.

Nevertheless, before this Court, petitioner insurance companies seek to escape any monetary responsibility for the damages they caused to injured workers by their suspensions of workers' compensation medical benefits through the supersedeas provisions of Act 44. Petitioners claim that they were not "state actors" when they invoked the utilization review and supersedeas provisions of Pennsylvania law to stop injured workers medical benefits without prior notice or an opportunity to be heard.

The reality of Pennsylvania's supersedeas procedure and the principles flowing from this Court's state action decisions dictate otherwise. In particular, the insurance companies' statutory invocation of supersedeas—prior to any medical determination concerning the appropriate medical treatment of disabled workers—and stopping the exclusive source of payments for disabled workers' medi-

cal care—are "fairly attributable to the State." For this reason, they fall well within the ambit of "state action" as defined by this Court in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Tulsa Profession Collection Services v. Pope*, 485 U.S. 478 (1988); and *Blum v. Yaretsky*, 457 U.S. 991 (1982).

Amicus Federation further addresses arguments advanced by petitioners and their *amici* regarding a host of supposed misfortunes that will befall workers' compensation and utilization review as a result of the holding below. In fact, we show that the Third Circuit's due process ruling in this case is consistent with reported state cases from many other jurisdictions requiring prior notice and an opportunity to be heard prior to stopping workers' compensation benefits. Finally, even with due regard for medical cost containment, there is simply no validity in an argument that legitimate utilization review requires stopping workers' compensation medical care prospectively for disabled workers without any prior notice to the injured worker and an opportunity to offer evidence contesting the proposed suspension of medical benefits.

As we now show in greater detail, the decision of the Court of Appeals for the Third Circuit should be affirmed.

ARGUMENT

I. INSURANCE COMPANIES WERE "STATE ACTORS" WHEN THEY USED STATUTORY PROVISIONS GIVING THEM AUTHORITY TO STOP, WITHOUT PRIOR NOTICE OR AN OPPORTUNITY TO BE HEARD, WORKERS' COMPENSATION PAYMENTS THAT WERE DISABLED WORKERS' EXCLUSIVE SOURCE OF MEDICAL BENEFITS.

Where private defendants infringe federal rights and their actions are "fairly attributable to the State," these private parties are "state actors" for purposes of the Fourteenth Amendment. *West v. Atkins*, 487 U.S. 42, 54 (1988) (Blackman, J.). In addition, where private

defendants "have exercised power 'possessed only because the wrongdoer is clothed with the authority of state law,' " they have acted "under color of state law" for purposes of Section 1983. *Id.* 49 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941).

Here, all must agree that workers' compensation medical benefits are a form of property protected from deprivation by the Fourteenth Amendment. Indeed, because these statutory benefits are creatures of state law[2] and a compelled substitute for injured workers' common law tort causes of action against their employers for work-related injuries,[3] there can be no question in this regard.[4] *Sullivan v. Barnett*, 139 F.3d 158, 168 n. 18 (3rd Cir. 1998) (and accompanying text) *cert. granted* No. 97-2000 (September 29, 1998).

---

[2] Pennsylvania Workers Compensation Act, 77 Pa. Stat. Ann. § 1 *et seq. See especially* 77 Pa. Stat. Ann. § 1053 requiring the Commonwealth to establish a fund to pay workers' compensation benefits to eligible employes in the event that workers' compensation insurers are insolvent.

[3] Pennsylvania enacted its workers' compensation law pursuant to a 1915 constitutional amendment, Article III, § 21, which is now remembered as Article III, § 18. *See* Purdon's Pa. Stat. Art. 3, § 18 and historical notes. The amendment specifically authorized the General Assembly to provide for a compensation system "regardless of fault" for injuries and diseases arising in the course of employment and limiting the amount of recovery for those injuries. The Act provides that "The liability of an employer under this act shall be exclusive and in the place of any and all other liability to such employe[e]s . . . or anyone otherwise entitled to damages in any action at law or otherwise on account of any injury or death." 77 Pa. Stat. Ann. § 481(a).

[4] Statutory public benefits, like workers' compensation benefits, have been repeatedly characterized as property interests protected by due process. In addition, because a "cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause," *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), the state's mandatory substitution of workers' compensation benefits for common law remedies likewise renders that substitute a protected property interest.

From 1984 until 1993, Pennsylvania did not suspend workers' compensation wage loss or medical benefits to injured workers without the consent of a worker or an order of a workers' compensation administrative law judge. This was the outcome of *Baksalary v. Smith*, 579 F.Supp. 218 (E.D. Pa. 1984) (three-judge court), *appeal dismissed sub nom. Allstate Insurance Co. v. Baksalary*, 469 U.S. 1146 (1985), *aff'd* 772 F.2d 893 (3rd Cir. 1985), and a consent decree concluding that case by preventing the use of supersedeas to stop workers' compensation benefits without due process of law. *Baksalary v. Smith*, 591 F.Supp. 1279 (E.D. Pa. 1984) (approving consent decree).

In July 1993, the Legislature passed Act 44 to restore supersedeas suspensions of workers' compensation medical benefits under the guise of "utilization review." Codified as 77 Pa. Stat. Ann. § 531(5) and (6). Given the favorable outcome below on respondents' due process facial challenge to the constitutionality of the restored supersedeas provision, and the Commonwealth's modification of its supersedeas procedure[5] following this Court's denial of its petition for certiorari,[6] injured workers in Pennsylvania should no longer have their workers' compensation medical benefits suspended without notice and an opportunity to be heard.

This Court has relied upon a number of tests or factors in its cases interpreting the "state action" requirement of the Fourteenth Amendment and the closely related "color of law" requirement of Section 1983. *Amicus* Federation believes that a determination of "state action" arises in this case from the proper application of interrelated factors presented by Pennsylvania's workers' compensation law and its challenged supersedeas provision. Taken together, these factors compel the conclusion that the in-

[5] *See* Joint Appendix, 50, 53.

[6] *Butler v. Sullivan*, No. 98-161, *cert. den.* October 5, 1993.

surer's exercise of explicit statutory authority to invoke supersedeas suspensions of medical benefits under Act 44 was "fairly attributable to the state" and the Court of Appeals' decision in this regard should be affirmed.

In determining whether a nominally private party is a "state actor," this Court "ask[s] first whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority, . . . and, second whether the private party charged with the deprivation could be described in all fairness as a state actor." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (Kennedy, J.) (citations omitted). Cast in somewhat different terms, the Court has held that a complaining party must "show a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

Here, the overall context for supersedeas suspensions of workers' compensation medical benefits in a governmental benefits program, the explicit statutory authorization of supersedeas, and the specific role played by insurers and the state agency in invoking supersedeas all compel a conclusion that petitioner insurance companies are "state actors" for purposes of their involvement in the supersedeas process.

To begin, workers' compensation is properly characterized as a "traditional government fuction" carried out by the State. In fact, only a State can replace workers' common law rights to sue their employers in tort for workplace injuries—seeking pain and suffering damages, as well as punitive damages—and substitute workers' compensation wage loss and medical benefits in their stead.[7] In order to effectuate this substitution of remedies

[7] Workers' compensation laws were passsed to provide, on a no-fault basis, partial wage replacement and medical benefits to em-

for employment-related injuries and disease, workers' compensation is the exclusive remedy for injuries and diseases arising within the scope of employment in Pennsylvania. 77 Pa. Stat. Ann. § 481(a) (quoted in note 2, *supra*).

In our view, the exclusive role played by workers' compensation in Pennsylvania is highly significant. This Court's early government function state action cases "had one thing in common: exclusivity." *Edmonson v. Leesville Concrete*, 500 U.S. at 640 (O'Connor, J., dissenting) (discussing *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 325 U.S. 501 (1946); *Smith v. Allwright*, 321 U.S. 649 (1944); and *Nixon v. Condon*, 286 U.S. 73 (1932)). And, exclusivity is an element in more recent decisions finding state action as well. *West v. Atkins*, 487 U.S. at 54-55 ("Under state law, the only medical care [prisoner] West could receive for his injury was that provided by the State.") and *Edmonson*, 500 U.S. at 622 ("[P]eremptory challenges have no utility outside the jury system, a system which the government alone administers.")

Here, the Commonwealth compelled injured workers to use workers' compensation medical benefits exclusively to obtain medical care for their work-related injuries and disease. This exclusivity feature of workers compensation, combined with Pennsylvania's statutory guarantee

ployees injured in the scope of their employment. Workers lost their common law rights to sue employers in tort for compensatory and punitive damages. As a result of this "legislated compromise," employers gained tort immunity and workers' compensation became the exclusive means of addressing wage continuation benefits and medical coverage for injured workers. *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925, 931-932 (1984) (Marshall, J.). At the same time, employers lost three tort defenses for negligence actions (referred to as the "Unholy Trinity"); the "fellow servant" rule, contributory negligence, and assumption of risk. Kramer, O. and Richard Briffault, *Workers Compensation: Strengthening the Social Compact* (1991, Insurance Information Institute Press), 13-16. *See also, New York Central RR v. White*, 243 U.S. 188, 197-201 (1917).

of benefits, dictates a finding that workers' compensation benefits serve a traditional public function in Pennsylvania.[8]

Just as significantly for state action purposes, Act 44's supersedeas provision and its implementing regulations authorized insurance companies or self-insured employers to perform a "traditionally governmental function" within the workers' compensation program—the suspension of injured workers' medical benefits through initiation of supersedeas. As the court below wrote:

> The right to invoke the supersedeas, or to stop payments, is a power that traditionally was held in the hands of the state. When insurance companies invoke the supersedeas (i.e., suspension) of an employee's medical benefits, they compromise an employee's State-created entitlements.

Sullivan v. Barnett, 139 F.3d at 168.

While Act 44's supersedeas procedure took place in the context of so-called "utilization review," there is no congruence between legitimate utilization review of medical treatment and Pennsylvania's automatic suspension of future payments for medical treatment—*invoked not as a result of utilization review by a neutral party, but on the motion of the party initiating the review and prior to the*

[8] Obviously, the state action question will differ according to each state's workers' compensation law. For example, Texas is one of the few states in which workers' compensation is voluntary. "In states that have compulsory compensation acts, the right of an injured employee to compensation for his or her injuries ordinarily rests on the idea of status rather than that of implied contract. But in Texas coverage is elective and the legal relation that arises between the employee, the employer, and the insurer who bring themselves within the scope of operation of the workers' compensation laws is contractual." 75 Tex. Jur. 3d, Work Injury Compensation § 5 at 46 (1991). For this reason, *Barnes v. Lehman*, 861 F.2d 1383 (5th Cir. 1988), cited by petitioners, arises out of an entirely different legal context and is inapplicable here.

utilization review taking place.[9] As a result, supersedeas is more, in terms of its impact, than a dispute over a medical bill. In the case of injured workers with chronic conditions or ongoing treatments, supersedeas operates as an effective termination of medical benefits pending the outcome of administrative hearings.

For state action purposes, this central role of private insurers in the suspension of workers' compensation medical benefits is critical. In *Blum v. Yaretsky*, 457 U.S. 991 (1982) (Rhenquist, J.), this Court drew a careful distinction between private physician and administrator certifications of need used in determining the level of nursing home care appropriate for Medicaid recipients and subsequent state adjustments in the level of Medicaid reimbursements for that care in reaction to those certifications.

> The [certification] decisions about which respondents complain are made by physicians and nursing home administrators, all of whom are concededly private parties. There is no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits in conformity with changes in the cost of medically necessary care.

Blum, 457 U.S. at 1005. Rejecting the dissenting justices' argument that the certifying phsyicians' were not properly considered "private judgments about the health needs of patients," Justice Rehnqust noted for the Court that

> Transfers to lower levels of care . . . occur only *after* an assessment of [the patients' health] needs.

[9] Once the utilization review form was submitted by the insurance company or employer, it was reviewed by the state Bureau of Workers' Compensation and approved if all information was provided. If approved, the employer or insurer could invoke supersedeas to suspend payments of medical benefits for the duration of the utilization review process, unless and until the suspension was reversed by a workers' compensation judge. *See* 34 Pa. Code § 127.208(e) (1996), quoted at 139 F.3d at 164 n.2 and accompanying text.

> In other words, although 'downward' transfers are made possible and encouraged for efficiency reasons, they can occur only *after* the decision is made that the patient does not need the care he or she is currently receiving. . . . *That judgment is a medical one, not a question of accounting.*

457 U.S. at 1008 n. 19 (emphasis added). *See also* 457 U.S. at 1008 and 457 U.S. at 1012 (White, J. concurring).

In contrast to the level of care certifications in *Blum*, what Act 44 sought and accomplished was a quick and easy means of cutting medical costs in Pennsylvania's workers' compensation program.[10] Without any need for a particularized showing that continued care was inappropriate, overpriced, or excessive, insurance companies had the legal power and the economic incentive to invoke supersedeas.

As a result of the exclusive remedy provision of its law, Pennsylvania workers already deemed disabled by workplace injuries whose medical benefits were stopped by supersedeas were denied medical coverage for their treatment for the months or years until their cases could be heard by a workers' compensation judge. Unless they were lucky enough to have a medical provider willing to risk not getting later reimbursement, supersedeas was tantamount to an indefinite, *ex parte* suspension of workers' compensation medical benefits for workers with chronic injuries or diseases requiring continuing care.

[10] This case likewise differs from the exercise of professional judgment by a public defender in *Polk County v. Dodson*, 454 U.S. 312 (1981). There, this Court held that when representing an indigent criminal defendant a public defender was not acting under color of state law. In particular, in reaching its conclusion this Court relied upon the independence of the defense attorney's judgment under neutral ethical standards and the adversarial relationship between criminal defense attorneys and the state. 454 U.S. 318-320. In this case, the state and the petitioner insurance companies were far from adversarial. In fact, invocation by insurers of supersedeas prior to any neutral parties' involvement in utilization review advanced the shared interests of the state and the insurance companies in medical cost cutting.

Clearly then, the insurers invoking supersedeas crossed the line between "medical" decisions and "accounting" decisions and, as well, between "private" action and "state" action. Because they crossed this line between private functions and governmental functions, the Petitioners' actions can be "fairly attributed" to the state as part and parcel of the state's workers' compensation cost containment scheme.

As noted by the Third Circuit, the "purpose of Act 44 was to contain the spiraling costs of medical treatment for work-related injuries." *Sullivan v. Barnett*, 139 F.3d at 162. Concomitant with medical cost containment, of course, were increased profits for the insurance companies and an improved "business climate" for the Commonwealth—goals that both these parties were willing to jointly advance by terminating workers' compensation medical benefits through a so-called "utilization review" process.[11] Significantly, this process, by design, excluded admittedly injured workers from involvement and ensured that they could not effectively restore their medical benefits for months, if not years, after the supersedeas was invoked by the involved insurers. Accordingly, the Third

[11] Petitioners and their *amici* spend a good deal of their briefs recounting a "parade of horribles" that they allege will follow if this Court affirms the Third Circuit's state action holding. However, petitioners have failed, in our view, to explain why legitimate utilization review requires the exclusion of injured workers and the termination of medical benefits without prior notice and an opportunity to be heard. Indeed, as we discuss later, state courts have agreed with the Third Circuit's due process holding, either upon the basis of due process or based upon an application of their state's workers' compensation law. Moreover, the fact that private insurance companies are state actors for purposes of supersedeas does not make them state actors for all other purposes. *Compare Polk County v. Dodson*, 454 U.S. 312 (1981) (public defender not acting under color of law when acting as attorney for indigent criminal defendant) *with Tower v. Glover*, 467 U.S. 914 (1984) (O'Connor, J.) (alleged conspiracy between state public defenders and other public officials satisfies "color of law" requirement of Section 1983).

Circuit's characterization of petitioner insurance companies as "a partner or an arm of the State" was wholly accurate.

"[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found." *Tulsa Profession Collection Services v. Pope*, 485 U.S. 478, 486 (1988) (O'Connor, J.). Pennsylvania's scheme for supersedeas suspensions of medical benefits in Act 44 created a process in which the Bureau of Workers' Compensation and private insurers acted in concert to reduce medical benefits for injured workers with the specific authority of state law. The close interaction and extent of state agency involvement are recounted in detail in the opinion below. *See Sullivan v. Barnett*, 139 F.3d at 162-165.

In *Tulsa Professional Services*, this Court found a probate court's appointment of an executor or executrix (triggering the operation of the nonclaim statute), the use of court forms requiring the publication of notice regarding the filing of claims, and the filing of the published notices with the probate court constituted "significant state action." 485 U.S. 487. In our view, the degree of state involvement in supersedeas under the challenged Pennsylvania statute rises well above the level of state action deemed "pervasive and substantial" in *Tulsa Professional Services*, 485 U.S. at 487.

Here, petitioners' use of supersedeas was authorized, not mandated, by Act 44, Pa. Stat. Ann. § 531(6), and its implementing regulations, Pa. Code § 127.208(e). Therefore, petitioners were willing participants in the supersedeas suspensions of disabled workers' medical benefits and cannot in any sense portray themselves as bystanders to a "self-executing" medical review process carried out by the state.[12]

[12] In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1981) (White, J.), this Court held that a private creditor corporation and its

Certainly, Pennsylvania's use of supersedeas in its workers' compensation system far exceeds the level of state action deemed sufficient to reach private parties in other cases. For example, this Court has held that the use by private parties or peremptory challenges in civil cases constitutes state action, *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and that private physicians acting as prison doctors are state actors in that setting, *West v. Atkins*, 487 U.S. 42 (1988).

When examined closely, the legal and factual context involved in the indefinite suspension of workers' compensation medical benefits by the petitioners was with the significant, overt encouragement of the state, so "that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 1004 (Rehnquist, J.). Because the Court of Appeals properly assessed the petitioners' role in invoking Pennsylvania's workers' compensation supersedeas to stop medical benefits to disabled workers, the petitioners were properly held to be state actors and the judgment below must be affirmed.

---

president were state actors when using an unconstitutional state pre-judgment attachment statute in conjunction with state officers. Three dissenting jutices expressed a concern in *Lugar* that treating a private citizen as a state actor for simply commencing a legal action was "plainly unjust." 457 U.S. at 945-9446 (Powell, J., dissenting with Rehnquist, J. and O'Connor, J.). The petitioners' willing invocation of supersedeas eliminates any such fairness concerts here, especially in light of what this Court termed the "obvious incentive unilaterally to cease payments" that the insurers will otherwise not be able to recover if utilization review later finds medical benefits were properly terminated. *Dillard v. Industrial Commission of Virginia*, 416 U.S. 786, 789 (1974) (Powell, J.).

II. DUE PROCESS REQUIREMENTS OF NOTICE AND AN OPPORTUNITY TO BE HEARD PRIOR TO INDEFINITE SUSPENSION OF WORKERS' COMPENSATION MEDICAL BENEFITS DO NOT CONFLICT WITH LEGITIMATE UTILIZATION REVIEW.

The due process argument regarding supersedeas by Petitioners and their *amici*, in our view, wrongly states that the decision below is destructive of legitimate utilization review or effective control of workers' compensation medical costs in Pennsylvania and elsewhere. Petitioners have not shown how the challenged method of supersedeas contributed to accuracy of payments—only to blind cost cutting. *Amicus* Federation believes that a review of state cases throws light on both the due process questions before this Court and the suggestion that basic due process requirements are in serious conflict with effective medical cost control in workers' compensation.[13]

The decision of the Court of Appeals in this case is not contrary to the approach of those state courts that have reached similar due process issues. The majority of state court decisions that have confronted the question of suspensions or terminations of workers' compensation benefits have concluded that due process (or the language of their state statutes) requires prior notice to the affected worker and an opportunity to be heard on the proposed termination.[14]

---

[13] In addition to utilization review, states have employed a variety of medical cost control mechanisms to workers' compensation programs in recent years, including restrictions upon workers' choice of medical provider or limits on changing providers, mandated managed care, adoption of medical fee schedules, regulation of hospital charges, and medical bill reviews. S. Eccleston and C. Yeager, Workers' Compensation Research Institue, *Managed Care and Medical Cost Containment in Workers' Compensation, A National Inventory, 1997-1998*, xvii-xix.

[14] *See generally* Larson, *Law of Workers' Compensation* (1991) § 81.31(g) at 15-1176 to 15-1183 and Supp. (and cases cited therein).

In *Beckler v. North Dakota Workers Compensation Bureau*, 418 N.W.2d 770 (N.D. 1988), the North Dakota Supreme Court, applying, the *Mathews v. Eldridge* [15] balancing test, held that the continuing right to workers' compensation disability benefits was a protected property right and that due process required prior notice, a summary of the medical evidence, and an opportunity to respond before termination of these benefits. 418 N.W.2d at 772-775. *Accord, Frohlich v. North Dakota Workers Compensation Bureau*, 556 N.W.2d 297, 301-302 (N.D. 1996) (citing *Beckler* and state statutory requirements codifying *Beckler*).

The Supreme Courts of West Virginia and Iowa have agreed with the approach in *Beckler*. *Mitchell v. State Workmen's Compensation Comm'r*, 163 W.Va. 107, 256 S.E.2d 1 at 4 (1979) (Syllabus Pt. 3) (termination of temporary total disability award requires advance notice and an opportunity to supply information, unless the claimant returns to work): *see also Allen v. Workers' Compensation Comm'r*, 173 W.Va. 238, 314 S.E.2d 401 (1984); *Auxier v. Woodward State Hospital-School*, 266 N.W.2d 139, 142-143 (Iowa, 1978), *cert. den.*, 439 U.S. 930 (1978) (state and federal due process requires pretermination notice and opportunity to protest and present proof). *See also Carr v. SAIF Corp.*, 65 Or. App. 110, 670 P.2d 1037, 1046 (1983) (In Banc), *pet. rev. dismissed*, 297 Or. 83, 679 P.2d 1368 (1984) (same).

The Maine Supreme Court declined to require pretermination hearings of voluntary initial payments made under its workers' compensation act (so-called "pay without prejudice" payments), but noted that, once benefits were formally awarded, the Maine act required continuation of benefits until a full hearing and completion of any appeal. *Valliere v. Workers' Compensation Board*, 669 A.2d 1328, 1330 n.2 (Me. 1996), *cert. den.*, —— U.S. ——, 117 S.Ct. 95, 136 L.Ed.2d 50 (1996). *See also*,

[15] 424 U.S. 319 (1976).

Higgins v. Wyoming Worker's Compensation Division, 739 P.2d 129 (Wyo. 1987), *cert. den.*, 484 U.S. 988 (1987) (holding that temporary total disability benefits could be stopped once physician stops monthly certifications of disability assuming that prompt post-termination hearing is provided). Decisions from Rhode Island and Missouri indicate that statutes in these states prevent unilateral discontinuances of workers' compensation payments as well. *Lavey v. Thomas Olean & Sons*, 502 A.2d 344, 346 (R.I. 1985); *P.M. v. Metromedia Steakhouses*, 931 S.W.2d 846, 847-848 (Mo. App. 1996).

Like the Court of Appeals in this case, these state courts have conducted assessments of the due process requirements that obtain for their particular workers' compensation laws in light of this Court's due process decisions. Like the Court of Appeals, they have concluded, in most circumstances, that the *Mathews v. Eldridge* balancing test requires prior notice and an opportunity to be heard. On the record before this Court, *Amicus* Federation agrees with the Court of Appeals that, under Pennsylavnia's workers' compensation system, basic due process requires prior notice and an opportunity to be heard before disabled workers' medical benefits can be suspended indefinitely through the invocation of supersedeas.

Workers' compensation was one of our nation's earliest social insurance programs. For this reason, workers' compensation statutes were adopted initially without regard for modern concepts of due process. As the National Commission on State Workmen's Compensation Laws wrote in 1972, "The basic principles of the present [workers' compensation] program are largely those established 50 or 60 years ago; they can be completely understood only in the context of forces present at their creation." *Report of the National Commission on State Workmen's Compensation Laws* (1972) at 35. To the extent that state courts have faced challenges to those earlier state practices in the light of current due process stand-

ards, the majority have concluded that their state's practices fall short. Petitioners' argument that its summary of state practices with respect to suspensions of benefits in other states should be persuasive authority for this Court's application of due process to Pennsylvania's supersedeas law falls short as well.[16]

In short, generalizations about the impact of the Court of Appeal's decision on other states' workers' compensation programs are, at best, difficult to assess. Nevertheless, it is clear that Pennsylvania's workers' compensation law provides injured workers with a constitutionally protected property interest in their medical benefits that cannot be terminated or suspended without prior notice and an opportunity to be heard. For this reason, the decision below holding invalid on due process grounds the use of supersedeas to stop injured workers' medical benefits should be affirmed.

---

16 Petitioners' argue, for example, that state practices regarding the payment of disputed medical bills parallel Pennsylvania's supersedeas' practice. Petitioners' Brief at 48. The Workers' Compensation Research Institute's most recent national inventory, upon which petitioners rely, states that in Pennsylvania "the payer must pay the entire bill while awaiting resolution of the dispute." S. Eccleston and C. Yeager, Workers' Compensation Research Insitute, *Managed Care and Medical Cost Containment in Workers' Compensation, A National Inventory, 1997-1998*, 16. At a minimum, this proves our point that generalizations about state practices are a problematic basis for this Court to use to decide what process is due for workers in Pennsylvania.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RODERICK M. HILLS, JR.
Assistant Professor of Law
THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
625 South State Street
Ann Arbor, Michigan 48109-1215
(734) 763-9635

RICHARD W. MCHUGH
Counsel of Record
MICHIGAN POVERTY LAW
PROGRAM-WEST
611 Church Street, Suite 4D
Ann Arbor, Michigan 48104-3000
(734) 332-1015
Counsel for Amicus Curiae